

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1022

Cir. Ct. No. 2013CV7477

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JEROME E. RANDALL,

PLAINTIFF-APPELLANT,

v.

PNC CAPITAL MARKETS LLC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Jerome E. Randall, *pro se*,¹ appeals an order of the circuit court granting summary judgment to PNC Capital Markets, LLC. The

¹ Though appearing *pro se*, Randall is a licensed attorney in this state.

circuit court determined that the parties' entire relationship was governed by a contract, barring Randall's claim of promissory estoppel. Randall also challenges the circuit court's earlier nonfinal order, which dismissed a misrepresentation claim. We affirm the circuit court.

BACKGROUND

¶2 Randall had a mortgage on a building in Milwaukee for a loan he obtained in August 2007, with an interest rate of 7.125%. A final balloon payment was due in September 2014. PNC acquired the mortgage as a successor to the original bank.²

¶3 "Prior to September 3, 2010," Randall contacted PNC about lowering his interest rate. The complaint alleges that Randall was told "The defendant was modifying interest rates on loans." Randall alleged he was given the name of the person in charge of interest rate modifications but never received a return of his phone messages. Randall therefore paid off most of the loan and inquired on adjusting the rate on the balance. A branch manager to whom Randall spoke in person ostensibly told him that a modification "would be no problem" and she could take care of it in-house. When Randall followed up, the manager told him that her supervisor would not approve the modification. Randall paid off the loan shortly thereafter.

² PNC Capital Markets, LLC, the named defendant-respondent, asserts that it was actually PNC Bank, National Association that acquired the note and mortgage. While this suggests a complaint that PNC Capital Markets is not a proper party, it does not indicate whether this concern was raised in the circuit court.

¶4 Randall filed suit on August 19, 2013, claiming \$20,000 damages from excess interest payments due to PNC’s failure to inform him earlier that it was not going to modify or consider modifying his loan. “In reliance upon” the bank’s representation that it was modifying loans and would consider modifying his loan, Randall alleged he delayed seeking refinancing elsewhere.

¶5 The complaint does not clearly set out a specific cause of action, but PNC discerned two possible tort claims: misrepresentation and promissory estoppel. PNC moved to dismiss the complaint for failure to state a claim, arguing that Randall had failed to present sufficient factual assertions to sustain either claim. PNC also alleged that Randall failed to show detrimental reliance on any representations.

¶6 After a hearing, the circuit court concluded that Randall had not adequately pled misrepresentation, and it dismissed that claim from the case. However, it concluded that there was a sufficiently pled claim for promissory estoppel, and noted that the claim appeared to hinge on the terms of any contract between the parties. The circuit court ordered PNC to file a motion for summary judgment.

¶7 PNC filed its motion for summary judgment. After briefing and argument, the circuit court concluded that the promissory estoppel claim failed “because the parties entered into a contract which embod[ies] the essential elements of the total business relationship.... [I]t declares that the agreement constitutes the entire understanding and agreement of the parties ... [and] requires any amendments to be in writing.” It also noted that “[a]ny alleged promise regarding a loan modification would be too vague and uncertain to support a

promissory estoppel claim here.” As a result, the circuit court dismissed Randall’s complaint, and Randall appeals.

DISCUSSION

I. Misrepresentation and the Motion to Dismiss

¶8 “A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint.” *Repetti v. Sysco Corp.*, 2007 WI App 49, ¶2, 300 Wis. 2d 568, 730 N.W.2d 189. We review the sufficiency of a complaint *de novo*. *See id.* We take the facts set forth in the complaint as true, along with reasonable inferences therefrom, dismissing only if it is certain that no relief can be granted under any set of facts that plaintiff might prove. *See id.*

¶9 The essential elements of misrepresentation are: (1) a representation of fact was made; (2) that representation was false; (3) the defendant made the representation either knowing that it was false or recklessly and without regard for the truth; and (4) the plaintiff believed the representation was true and relied on it to his or her detriment. *See Wausau Med. Ctr. v. Asplund*, 182 Wis. 2d 274, 290, 514 N.W.2d 34 (Ct. App. 1994). Further, a misrepresentation claim must be pled with particularity, including who, what, where, when, and how. *See Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271; *see also* WIS. STAT. § 802.03(2) (2013-14).³

¶10 On appeal regarding this issue, Randall claims only that the circuit court did not explain the inadequacy of his complaint, denying him the ability to

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

amend the complaint. He does not develop the argument any further, nor does he cite any authority for the implicit proposition that the circuit court must detail a complaint's deficiencies. Generally, we need not consider undeveloped arguments, unsupported by reference to legal authority. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶11 In any event, the complaint is hopelessly vague. Randall did not identify specifically *who* told him the bank was modifying loans. He says only that he spoke to “personal bankers” who gave him the name of the person in charge of rate modification. But Randall never spoke to that person. He also does not specifically identify the local branch manager he contacted.

¶12 The complaint does not identify particularly *what* representations are made or that they were false. The closest allegation is that PNC somehow represented “the bank was in fact modifying interest rates on outstanding loans and would in fact consider” modifying Randall’s loan. However, based on the rest of the complaint, Randall was indeed considered for a modification, but his request was denied. Randall does not, in the complaint, allege that PNC ever represented he would actually receive a modification.⁴

¶13 The only indication of *when* anything happened is an allegation that Randall “contacted the defendant approximately 30 months to inquire about loan modification.” This evidently should say Randall contacted PNC “thirty months ago,” prior to the filing of the complaint, but stating approximately when

⁴ The allegation that, when he inquired about a rate adjustment with the branch manager, Randall “was advised that it would be no problem and that it could be done in-house without any additional cost” is not sufficiently specific. “It” might be a rate adjustment, or “it” might be simply an application for the rate adjustment.

something happened is not pleading with particularity. There is no particular timeline about how long Randall waited for contact from the person in charge of modifications, when he paid off most of the loan, when he spoke to the branch manager, when he followed up with her, or when he paid off the rest of the loan.

¶14 Randall also does not plead specific facts related to damages. While he claims \$20,000 in damages for excess interest payments, he does not allege that he obtained financing elsewhere or that he would have received a lower interest rate had he shopped for rates earlier. In short, this means Randall has not adequately alleged any detrimental reliance on any representations by PNC. Accordingly, the circuit court properly dismissed the misrepresentation claim.

II. Promissory Estoppel and Summary Judgment

¶15 We review summary judgments *de novo*. See *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. See WIS. STAT. § 802.08(2).

¶16 The elements of promissory estoppel are that a person made “a promise that: (1) the promisor reasonably should have expected would induce substantial action or inaction, (2) did induce such action or inaction, and (3) must be enforced to avoid injustice.” See *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶53 n.8, 265 Wis. 2d 703, 666 N.W.2d 38. “The purpose of promissory estoppel is to enforce promises where the failure to do so is unjust.” *Skebba v. Kasch*, 2006 WI App 232, ¶8, 297 Wis. 2d 401, 724 N.W.2d 408.

¶17 However, “a contract is an absolute bar to a promissory estoppel claim, unless it does not embody all the essential elements of the business

relationship.” *Teff*, 265 Wis. 2d 703, ¶53. This rule exists “to prevent a party from accomplishing under a promissory estoppel claim what it cannot accomplish under the principles of contract construction—resort to extrinsic evidence to establish terms of a contract that are not contained in the plain language of the contract and are inconsistent with it.” *Id.*, ¶61.

¶18 Randall claims the circuit court here erred “by refusing to look beyond the four corners of the mortgage note.” While Randall suggests that courts frequently grant relief on promissory estoppel claims despite the existence of a contract, we note the following. *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), the first Wisconsin case to adopt promissory estoppel, does not apply here because there was no contract in that case. *See id.* at 697-98. The court in *Kramer v. Alpine Valley Resort, Inc.*, 108 Wis. 2d 417, 321 N.W.2d 293 (1982), affirmed the plaintiff’s recovery under promissory estoppel despite a lease contract because the court determined that “the lease agreement does not embody the total business relationship of the parties[.]” *Id.* at 419. And the issue in *Skebba*, 297 Wis. 2d 401, was a question of fashioning a remedy, not whether a remedy should be had. *See id.*, ¶¶1, 10-12.

¶19 Here, the circuit court concluded that the contract—the mortgage, promissory note, and a business agreement—embodied the parties’ entire relationship. Randall’s main brief does not address why this decision is faulty, and we need not consider arguments raised for the first time in a reply brief. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). In short, the circuit court determined that the mortgage contract sets out the parties’ obligations to each other and requires any amendments to be in writing, so oral promises to amend mean nothing and should not be relied upon.

¶20 While Randall apparently would have a court engage in a promissory estoppel analysis first, before turning to the contract, “the existence of a contractual relationship will bar a claim based on promissory estoppel ... subject to an exception where the contract fails to address the essential elements of the parties’ total business relationship.” See *Kramer*, 108 Wis. 2d at 425. This suggests that consideration of the contractual relationship between the parties is an important, and sometimes dispositive, step in the analysis of a promissory estoppel claim, as it was here. We discern no error.

By the Court.—Order affirmed.

This opinion shall not be published. See WIS. STAT. RULE 809.23(1)(b)5.

